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In the Supreme Court of the United States

OCTOBER TERM, 1976

JAMES C. GABRIEL, APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

**WILLIAM R. WESSON AND JOHN CHARLES VAIANI,
APPELLANTS**

v.

UNITED STATES OF AMERICA, ET AL.

**ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF NEW JERSEY**

MOTION TO AFFIRM

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-405

JAMES C. GABRIEL, APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

No. 76-443

**WILLIAM R. WESSON AND JOHN CHARLES VAIANI,
APPELLANTS**

v.

UNITED STATES OF AMERICA, ET AL.

***ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF NEW JERSEY***

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

These are direct appeals from the final judgment of a three-judge district court (Gabriel J.S. App. 2a-8a; 416 F. Supp. 810) affirming an order of the Interstate Commerce Commission (347 I.C.C. 377). The Commission

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found, pursuant to Section 20a of the Interstate Commerce Act, as added, 41 Stat. 494, 49 U.S.C. 20a, that the issuance of securities by the Missouri Pacific Railroad Company ("MoPac") as part of a plan of recapitalization was "for a lawful object within the corporate purposes" of the carrier, "compatible with the public interest," and "reasonably necessary and appropriate for such purposes" (347 I.C.C. at 418). This plan of recapitalization implemented the settlement of a class action brought by holders of Class B MoPac stock. *Levin v. Mississippi River Corp.*, 59 F.R.D. 353 (S.D. N.Y.), affirmed *sub nom. Wesson v. Mississippi River Corp.*, 486 F. 2d 1398 (C.A. 2), certiorari denied, *sub nom. Wesson v. Levin*, 414 U.S. 1112. Appellants are dissatisfied members of that class.

The three-judge district court held that the Commission's approval of the issuance of securities in connection with the recapitalization plan was a valid exercise of its power under Section 20a and that the Commission's decision was based upon adequate findings in light of the evidence (Gabriel J.S. App. 8a). The court rejected appellants' contention that the Commission's order unlawfully deprived Class B stockholders of the value of their stock, and endorsed the Commission's conclusion that "book value cannot be the measure of fair value of stock; rather, earnings must be considered and the capitalized earnings method is the proper means of analysis" (Gabriel J.S. App. 7a).¹

¹In a separate suit challenging the same Commission order, another three-judge district court reached the same conclusion, *Labelle Gillespie v. United States, et al.*, Civil Action No. 74-239 C(2) (E.D. Mo.) (unreported opinion and judgment filed November 14, 1974).

ARGUMENT

The decision of the district court is correct, and these appeals present no substantial question warranting plenary consideration by this Court.

Appellants' complaint appears to be that the Commission's valuation of the Class B MoPac stock unlawfully deprived them of the value of that stock. This assertion is contrary to the law and the evidence and has been consistently rejected by the Commission and the courts, both in the context of the dispute over the recapitalization of MoPac and elsewhere.

As the district court observed, the Commission, in the performance of its narrowly limited function under Section 20a, approved MoPac's issuance of securities upon a finding, *inter alia*, that the allocation of new shares for old was "reasonable and fair in view of the present and prospective worth of MoPac" (Gabriel J.S. App. 7a). The Commission noted that MoPac, in its application for approval of the issuance of securities, had calculated the value of the old shares according to the capitalized earnings method and not, as appellants assert to be correct, according to the book or equity value of the stock (347 I.C.C. at 413). The Commission accepted the capitalized earnings valuation, stating that "class B stockholders are receiving value for value based upon recognized methods of valuation and that book or equity value has little or no significance in the evaluation of stock" (*ibid.*).

This conclusion is consistent with prior decisions of this Court, lower federal courts and the Commission. As this Court stated in *Ecker v. Western Pacific R. Corp.*, 318 U.S. 448, 483: "There is no more important element in the valuation of commercial properties than earnings." See also *Schwabacher v. United States*, 334 U.S. 182, 199;

Consolidated Rock Products Co. v. DuBois, 312 U.S. 510, 525-526; *Boston & M. R. Securities Modification*, 275 I.C.C. 397, 431-433. "The suggestion that the book value of the shares is any measure of their actual value is clearly fallacious." *Borg v. International Silver Co.*, 11 F. 2d 147, 152 (C.A. 2). See also *Levin v. Mississippi River Corp.*, *supra*, 59 F.R.D. at 370.

The Commission satisfied its obligation to ensure that minority interests are protected. See *Schwabacher v. United States*, *supra*, 334 U.S. at 201. Appellants and their co-holders of Class B MoPac stock received value for value. They were entitled to no more. As the Commission observed, the book value of the stock was a "potential value on liquidation which * * * can rarely, if ever, be realized" (347 I.C.C. at 413). Fairness to the minority stockholders was also ensured by the provision in the recapitalization plan requiring that the plan be approved not only by 75 percent of the shareholders of each class of stock, but also by a majority of the minority stockholders of each class.

Appellants are seeking to impose upon the financial structure of the railroad an obligation to which they are not entitled. *Schwabacher v. United States*, *supra*. Their claim was properly rejected by the court in *Levin v. Mississippi River Corp.*, *supra*, by the Commission, and by the court below.

CONCLUSION

The judgment of the district court should be affirmed.
Respectfully submitted.

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